

INDEX

| | <i>Page</i> |
|--|-------------|
| Petition for a Writ of Certiorari..... | 1 |
| Summary Statement of Matter Involved..... | 1 |
| Reasons Relied Upon for the Allowance of the Writ..... | 3 |
| Prayer of Petition..... | 4 |
| Supporting Brief of Petition for Writ of Certiorari..... | 7 |
| Statement of Issues | 7 |
| First, Was it the Purpose and Intention of the Congress to Delegate to the Administra- tor the Power to Regulate the Sales of such Liquors and Fix a Maximum Price Therefor in Mississippi?..... | 7 |
| Second, If the Answer is Yes, Then Did the Congress Have the Constitutional Power to do so Under the Twenty-first Amend- ment and the Statutes of Mississippi?..... | 8 |
| Argument | 8 |
| The Intention of the Congress..... | 8 |
| Two Classes of Commodities..... | 8 |
| Inherent Nature of Commodities Fix Their Status Under the Constitution..... | 10 |
| The Status of Intoxicants Depend on State Laws..... | 12 |
| Back Ground Twenty-first Amendment..... | 14 |
| Liquor Enforcement Act | 17 |
| The Declared Purpose of Congress..... | 19 |
| Administrative Provisions of The Act..... | 21 |
| Regulations | 22 |
| Administrator Can Buy or Sell Commodities..... | 22 |
| May Issue License | 23 |
| Maximum Lawful Price..... | 24 |
| No Basis Upon Which to Fix Maximum Price..... | 27 |
| Price Regulation Inconsistent With State Law..... | 31 |
| Second, Did the Congress Have Constitutional | |

| | |
|--|------------|
| Power to Regulate or Delegate Authority to Regulate Intoxicating Liquors in States Where Such Liquors are Without Property Rights and Contraband? | 34 |
| Bacardi Corp. v. Domenech 311 U. S. 150, 168 | 12 |
| Brewing Co. v. Liquor Commission 305 U. S. 391, 394 | 10 |
| Carter v. Virginia 321 U. S. 131 | 12 |
| Cohens v. Virginia 6 W. 264; 51 L. Ed. 257 | 18 |
| Collins v. Yosemite Park 304 U. S. 518, 533 | 13 |
| Crane v. Campbell 245 U. S. 304, 307 | 10 |
| Duckworth v. Arkansas 314 U. S. 390 | 12 |
| Encyclopedia Britannica, "Liquor Laws" | 15 |
| Hamilton v. Kentucky Distilleries 251 U. S. 146, 156 | 15, 37 |
| James Clark Distilling Co. v. Western Ind. R. R. Co. 242 U. S. 311, 332 | 36 |
| Jatros v. Bowles 143 Fed. (2d) (C.C.A. 6) 453 | 25 |
| Lincoln Savings Bank v. Brown 137 Fed. (2d) (E.C.A.) 228 | 29 |
| Linder v. U. S. 268 U. S. 5, 18 | 35 |
| Milligan, Ex Parte 4 Wall. 2, 121-127 | 38 |
| Mugler v. Kansas 123 U. S. 623 | 10 |
| Pacific Coast Dairy Co. v. Dept. Agr. 318 U. S. 285 | 13 |
| Reid v. Colorado 187 U. S. 137, 148 | 19 |
| Samuels v. McCurdy 267 U. S. 188, 198 | 10 |
| State Bd. of Equalization v. Young's Market Co. 299 U. S. 59 | 12 |
| U. S. v. Constantine 296 U. S. 287 | 32, 35 |
| U. S. v. Frankfort Distilleries U. S., 89 L. Ed. 649, Adv. Op. | 25 |
| Yakus Case 321 U. S. 414, 427 | 30 |
| Ziffrin Inc. v. Reeves 308 U. S. 132, 140 | 10, 12, 21 |

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

J. W. BARNETT, SR.

MRS. J. W. BARNETT, SR.

J. W. BARNETT, JR. **Petitioners**

v.

CHESTER BOWLES, Administrator **Respondent**

**PETITION FOR A WRIT OF CERTIORARI TO
THE EMERGENCY COURT OF APPEALS**

TO THE HONORABLE THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case arises under the Emergency Price Control Act of 1942 as amended June 30, 1944, and challenges the validity of Price Regulation No. 445 in which the Price Administrator fixed a maximum price on intoxicating liquors in Mississippi. Petitioners were indicted in the District Court for the Eastern Division of the Southern District of Mississippi for selling whiskey in Mississippi above the ceiling prices established by the Regulation No. 445. After having plead to the indictment, they filed in the District Court of Mississippi application for leave and were allowed to file complaint in the Emergency Court of Appeals under

Section 204 (e) (924(e) (1) 50 U. S. C. A. App.) of the
Emergency Price Control Act, (R. 22-35)

The complaint was filed in the Emergency Court of Appeals, being Cause No. 187 in said Court and presented for decision answers to two questions:

1. Was it within the intendment of the Congress or within the scope of the Emergency Price Control Act to delegate to the Price Administrator the power to establish maximum prices for such intoxicating liquors in Mississippi, under the laws of which such liquors are contraband and without property rights and the importation into or transportation within the State, the manufacture, use, ownership, or possession of such liquors within the State is contrary to the laws thereof, and the importation of such liquors into Mississippi being prohibited by the Twenty-first Amendment?
2. If the answer is "Yes", Then did the Congress have the power, in virtue of the Twenty-first Amendment and the Statutes of Mississippi, to prescribe such maximum prices or to delegate the power to do so to the Administrator?

The Emergency Court of Appeals answered each question in the affirmative, Chief Judge Maris dissenting, and held that such maximum price regulations were intended by and within the Constitutional power of the Congress. See opinion in Record, not yet reported. Judgment was rendered dismissing the complaint. (R.)

This Petition is filed seeking a review of that Judgment dismissing the complaint as authorized by Section

204 (d) (Section 924(e) 50 U. S. Ca. App.) of the Emergency Price Control Act. The relevant Sections of Mississippi Statutes, as to intoxicating liquors, are appended to the complaint filed by the Petitioners in the Emergency Court of Appeals, reference to which is hereby made. (R. 37-42.)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The case presents questions of the first importance relating (1) To the construction of the Emergency Price Control Act as touching the authority under said Act of the Administrator to prescribe maximum prices for intoxicating liquors in Mississippi where there is no property rights in such liquors, but are contraband; and (2) If the Act be construed to delegate such power to the Administrator, then the question arises as to the constitutionality of the Act in its application to such States under the Twenty-first Amendment and the laws of those States prohibiting the importation into and transportation within, or the possession or ownership of such liquors, or the manufacture therein of such liquors, which are questions of importance, not only to the parties to this cause, but to the proper interpretation and application of the Twenty-first Amendment to the laws of those States, which the Twenty-first Amendment obligates the Government to aid in enforcing by preventing importation into the States.

These are questions upon which this Court has never passed.

Aside from the importance of the issue presented, the decision below should be reviewed for the additional reason, we submit, that it is clearly erroneous and not in ac-

cord with the principles and spirit of applicable decisions of this Court.

The Court below, by divided opinion, has decided an important question of Federal law, which has not been but should be decided by this Court.

To the extent that the decision below sustains the validity of the Regulation as touching contraband liquors and the power of the Administrator to enter prohibition States and regulate the sales of liquor therein and impose penalties and invoke the administrative measures provided for in the Emergency Price Control Act is not in accord with the spirit of the Twenty-first Amendment and are contrary to the laws of Mississippi and the principles announced by the decisions of this Court.

In the interest of brevity, Petitioners do not at this time set forth all the points which will be urged at the argument of this cause should the Writ be granted, nor all the contentions in support of such points, but in order to comply with the rule of this Court that all issues upon which decision is requested be presented in a Petition for Certiorari, Petitioners here refer to and incorporate into this Petition all of the matters presented in their Petition or leave to file complaint in the Emergency Court of Appeals, presented to the District Court, (R. 22) with the same force and effect as if set forth herein in full.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the Emergency Court of Appeals, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to

be therein named, a transcript of the record and proceedings herein; and that the Judgment of the Emergency Court of Appeals be reversed by this Honorable Court; and your Petitioners pray for such other and further relief in the premises as to this Court may seem meet and just.

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IN THE
SUPREME COURT OF THE UNITED STATES

J. W. BARNETT, Sr., et al. Petitioners

v.

CHESTER BOWLES, Administrator Respondent

**SUPPORTING BRIEF OF PETITION FOR
WRIT OF CERTIORARI**

STATEMENT OF ISSUES

The Petitioners were indicted in the District Court of the Eastern Division of the Southern District of Mississippi for selling various brands of whiskies above the maximum prices prescribed by the Administrator of the Office of Price Administration in Regulation No. 445.

Petitioners filed complaint in the Emergency Court of Appeals seeking to have the Regulation declared invalid as to such liquors, since under the laws of Mississippi such liquors are contraband and without property rights. The Court held the Regulation valid and dismissed the complaint. They seek a review of that judgment, as appears from the Petition for Writ of Certiorari herewith filed.

Two questions are presented:

First, was it the purpose and intention of the Congress to delegate to the Administrator the power to regulate the sales of such liquors and fix a maximum price therefor in Mississippi?

Second, if the answer is Yes, Then did the Congress have the Constitutional power to do so under the Twenty-first Amendment and the Statutes of Mississippi?

ARGUMENT

1. The Intention of the Congress.

Two things are axiomatic:

First. The Court will examine the Emergency Price Control Act and giving effect to all its parts and provisions, thence deduce the intention of the Congress and give effect to the intention.

Second. That construction will be given, if possible, which will save the Act from any grave doubt as to its Constitutionality.

TWO CLASSES OF COMMODITIES

The commodities of the Nation are divided into two sharply defined classes:

First. Those wholesome and innoxious commodities that constitute the great body of commerce, the necessities of life, and those luxuries that gratify human vanity or serve the convenience of mankind.

We submit that the Congress was dealing only with this class of commodities in passing the Act. The Yakus Case dealt with this class of property only.

Second. Those commodities that by their inherent na-

ture, such as intoxicating liquors, with which we are here concerned, are classified as noxious.

The Twenty-first Amendment deals with these commodities and has segregated them from all other commerce, and are dealt with separately by Statutes of Congress and the States, in digests, even in Revenue Statutes.

Intoxicants must be sub-classed into those than can be lawfully sold under the laws of the States and those that are contraband in virtue of State laws. The Twenty-first Amendment applies only to this class where importation is prohibited by the laws of a state.

The Court below did not give recognition to these two distinct categories, and held that since whiskies are commodities, and were not expressly excluded by the Act they were necessarily included.

The Court in failing to give effect to all the provisions of the Act and construing it to apply to both types, adopted that construction that renders the Act unconstitutional as to intoxicating liquors in prohibition States, whereas the alternative construction would, we submit, have carried out the will of Congress and eliminated any Constitutional question.

There is no magic in a word. The Act was dealing with the Nation's commerce and the Nation's property. In that sense commodities connotes property and property rights. Property rights being absent, "prices" became meaningless.

The Commerce Clause, the Equal Rights Clause, the

Due Process Clause are not shelters for this type of property for Mississippi has destroyed its property rights and declared it to be contraband.

Brewing Co. v. Liquor Commission 305 U. S. 391, 394.

Ziffrin Inc. v. Reeves 308 U. S. 132, 140.

Crane v. Campbell 245 U. S. 304, 307.

Samuels v. McCurdy 267 U. S. 188, 198.

INHERENT NATURE OF COMMODITIES FIX THEIR STATUS UNDER THE CONSTITUTION

It is not by definition that commodities, under the Constitution, are to be classified and labeled, but by their inherent characteristics, their tendencies toward good or toward evil.

This Court fifty-eight years ago, in a memorable decision, ever since followed and never modified, announced the fundamental difference and the distinct cleavage between these two classes of commodities.

Mugler v. Kansas 123 U. S. 623,
we quote, page 657:

"In the License Cases, (5 How. 504) the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any

conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: 'If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.' * * * * Mr. Justice Grier, in still more emphatic language, said: "The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals must come within this category It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these evils, and all measures of restraint or prohibition necessary to effect

the purpose are within the scope of that authority. (pp. 631, 632.)"

This decision was handed down forty-six years before the Twenty-first Amendment, which Amendment, as we shall see, pledged the National Government to see to it that intoxicating liquor shall not enter the dry states.

It is the "Ishmaelite" of commerce. Its "tendency is to get out of legal bounds" *Duckworth Case* (314 U. S. 396); "The people of the United States knew that liquor is a lawlessness into itself." (Page 398).

THE STATUS OF INTOXICANTS DEPEND ON STATE LAWS

No passports are needed at state lines for the Nation's innoxious commerce, the States cannot interdict its importation or exportation, but because of its inherent qualities the States may do both with liquors, but even in passing through by motor transportation, it must be carried by roads marked out by the State, carry permits issued by the State, convoyed by armed guards of the State and under State control.

State Bd. of Equalization v. Young's Market Co. 299 U. S. 59.

Duckworth v. Arkansas 314 U. S. 390.

Carter v. Virginia 321 U. S. 131.

Ziffrin Inc. v. Reeves 308 U. S. 132.

Bacardi Corp. v. Domenech 311 U. S. 150, 168.

The National Government, if it so chooses, may permit or deny importation of liquors into its Reservations, subject to such controls as it sees fit, its jurisdiction there is exclusive, and the States, if they so choose, may exercise final control or total prohibition as they decide.

Collins v. Yosemite Park 304 U. S. 518, 533.

Pacific Coast Dairy Co. v. Dept. Agr. 318 U. S. 285.

The commodities treated of in the Twenty-first Amendment are not only unrelated to those protected, encouraged and fostered by the other provisions of the Constitution, but are repugnant thereto and are to be controlled, proscribed or confiscated as the State may declare.

The majority opinion below said that since intoxicating liquors were not expressly excluded by the Act they were thereby included, for the Act included all commodities not expressly excluded, and that liquors were commodities. In short, if we understand the opinion, it is that the inherent nature of the commodities and the different laws and Constitutional provision governing them, and the repugnance, as we have seen, between them do not divide them into two classes for the purpose of construing the Act, and the innumerable decisions of this Court (none of which are cited) denouncing the one and shielding the other, was no part of the Congressional consideration when the Act was passed.

Every exclusion named was with reference to lawful things and lawful relationships. If every exclusion was as to some lawful business or transaction, is it not reasonable to conclude that that was the type of commodities the Act dealt with?

Is it conceivable that because the sale of lottery tickets in the Irish sweepstakes was not expressly excluded, the Administrator would expressly be authorized to fix a maximum price as he could for a theatre ticket? Merely because houses of prostitution, or other nuisances, were not expressly named and excluded would that confer power on him to regulate them and prescribe conditions under which the "poor soiled doves of the under world" could be evicted from their brothel-cotes? Merely because the furtive opium peddler is not named, therefore the Act conferred the power to fix prices on "dope" and thereby enter into an unseemly race with the Narcotic Unit that seeks to suppress and destroy, whilst he gave tacit permission to sell at a fixed price? Merely, because "moonshine" is not excluded, *eo nomine*, would the Administrator have the right to prescribe prices for the "shiners dew" and add respectability to a commodity that a thousand Alcoholic Tax Unit boys seek by day and by night to find and destroy?

But why multiply instances? The Congress was dealing with a serious and delicate situation. There were millions of State and Federal Officers to hunt down, check and destroy those things inherently destructive of the social order, but there were no policemen to cope with the greed of landlords or the unconscionable vendors of life's necessities. The Act was passed to protect the American people against their plunder and not to guarantee cheap contraband liquors.

BACK GROUND TWENTY-FIRST AMENDMENT

Before noticing the declared purpose of the Congress in passing the Act, we will, for a moment, view the background against which the Congress worked, and note in

passing that neither in the committee hearings or the debates in Congress was the subject of intoxicants broached. The Congress was lighting no fuse to explode political dynamite.

No product of mankind has ever been of such anxious concern to all Nations as the traffic in intoxicants. Affected by climate and the character of the population, the laws and regulations have been in incessant flux. Nothing has been the object of so much experimentation, trial and error, and varied regulation and proscriptions.

ENCYCLOPEDIA BRITANNICA, "LIQUOR LAWS".

Since 1794, 151 years ago, when Washington and Hamilton sallied forth to suppress the "Whiskey Rebellion" against the first excise tax, to this day, this Nation has been harrassed, teased and perplexed by this problem.

It would invite the impatience of the Court and violate its rules as to conciseness to go into that history and the myriad experiments of National and State Governments. It is a tragic and drab story; the effort through the Wilson Act, the Volstead Act, and finally the Eighteenth Amendment to suppress the traffic as a war measure; how the distillers and producers conceded, and this Court held, that the total suppression of the traffic was "an appropriate means of increasing our war efficiency."

Hamilton v. Kentucky Distilleries 251 U. S. 146, 156.

If a sober Nation in World War I and in all past wars could prosecute war more efficiently, then how can a few dry states hamper the efficient prosecution of World War II?

The first World War came to its victorious conclusion, but the Volstead Act and the Eighteenth Amendment remained.

Suddenly, all the furies of Orestes and all the evils of Pandora's Box swarmed upon the great cities. "Home brew" foamed and popped, poisoned concoctions, masquerading under forged labels of respectability, brought disease and death. Racketeers roamed the streets leaving death and misery in their wake; police forces were impotent, "all the King's horses and all the King's men" couldn't cope with it; cartoonist had their heyday with the cadaverous gentlemen riding a famished camel, the very genius of bigotry and intolerance. Then the towns, the hamlets and villages and the rural dwellers, without police protection, smarting under the remembrance of more than a century of hopeless effort to prevent the importation of liquors into their communities, while the flood poured in under the protection of the Commerce Clause and the "original package" rule, sent forth their paunchy, masked and lead piped armed caricature, the embodiment of crime and debauchery. So the war raged for some fifteen years.

Then there appeared a flag of truce and the terms of the Armistice were:

If the States will adopt a Constitutional Amendment repealing the Eighteenth Amendment, then never again shall intoxicating liquors enter a State except with the consent of *that State* and the National Government will pledge its faith to prevent the importation, if contrary to the laws of *that State*.

The Twenty-first Amendment was then adopted by the

people through their State conventions, the only Amendment ever so adopted. It then became a covenant among the American people themselves.

The Congress in obedience to this mandate of the American people, enacted the Liquor Enforcement Act of 1936, so aptly cited by Chief Judge Maris in his dissent.

LIQUOR ENFORCEMENT ACT

27 U. S. C. A. Sections 221 et seq.

Section 223 prohibits the importation into dry States and prescribes penalties for so doing.

Section 224 provides that all such liquors, containers, vehicles or vessels used in such transportation shall be seized and forfeited. Such liquors are contraband even under the Federal law.

Thus stood the laws when the Emergency Price Control Act was passed in 1942. *Intention to Interfere With Penal Laws of State Must Clearly Appear.*

Under the laws of Mississippi the manufacture of liquor, the ownership or possession of a still, the possession or sale of, advertising for sale or displaying price lists are all crimes, following the usual pattern of prohibition laws.

If the Congress had intended to over-ride State Laws, ignore the Constitution, abandon the duty imposed by the Liquor Enforcement Act of 1936, and thereby regulate that which it was its duty to suppress, it is incomprehensible that it would not have so declared expressly.

This principle was announced by Chief Justice Marshall, more than a hundred years ago in:

Cohens v. Virginia 6 W. 264; 51 L. Ed. 257.

This case, as every law student knows, involved the sale of lottery tickets in the State of Virginia contrary to the laws of that state. The Congress had chartered a corporation with power to authorize the drawing of lotteries for effecting any important improvements in the city, etc. The Act did not say where the tickets could be sold. Cohens was indicted for selling tickets in Virginia. His defense was that the Congress had authorized the sale. His defense was denied and he was convicted and his case affirmed.

The brilliance of the opinion of the Chief Justice on the Constitutional question has so dimmed the opinion on the merits that it seems to have been overlooked by even the Digesters, yet it settled a question of no less importance.

He said (6 W. 442):

"To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed."

See also:

Reid v. Colorado 187 U. S. 137, 148.

THE DECLARED PURPOSE OF CONGRESS

What was the declared purpose of the Congress in passing the Act? Let us quote part of Section 1:

"To protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living."

Did the Congress here intend, in the light of generations of effort to suppress the evils of intoxicants, to pronounce that cheap contraband liquors would protect the standard of living of the class named, and that their incomes, their annuities, their pensions, and the wages of the laborer should be spent for cheaper outlawed liquor, when it has ever been the effort to have in war or peace a sober and an industrious people? Who would produce the best armaments, a sober or drunken worker? Whose savings would buy more bonds, the sot or the abstainer? But we shall not press the argument and abuse the Court's patience by asserting the obvious, nor follow through the ranks of the army from the private up to determine who is the healthier and better soldier.

"To prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices."

Did the Congress here intend to pronounce that high

priced contraband liquor is a hardship to boys and girls in school, and to the faculty and students in universities and to Federal, State and local governments?

How would the "abnormal increase in prices" of whiskey hurt any of them? Was it the hope of the Congress that contraband liquor be kept cheap around schools and universities, so that the young manhood and womanhood could get more of it? Is there a state in the Union that does not have liquor control in their schools and universities?

It was not by chance, as we have seen, that liquor was placed in a class by itself in the Constitution.

"To assist in securing adequate production of commodities and facilities."

Did the Congress intend that there should be an increase in the production of outlawed liquors? And the facilities for its production? The question carries its own answer.

"To prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in Section 3."

The Court needs no comment from us on this clause.

"And to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

Did the Congress have in its mind liquors? How long has it been since there was cooperation between the gov-

ernment and the production of contraband whiskey?

"It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and other heretofore or hereafter created), within the limits of their authority and jurisdiction, toward a stabilization of prices, fair and equitable wages, and cost of production."

Did the Congress intend to include liquor in their high purposes of government and to guarantee laborers cheap contraband?

There is not a line, sentence, or clause in the declaration of purpose in Section 1 that is not at war with the pronouncement of the Supreme Court of the United States on intoxicating liquors and its use and clearly demonstrates in the light of the history of intoxicating liquors that the Congress had not the slightest intention that contraband liquor was to be included in the beneficent purposes undertaken by the Congress.

ADMINISTRATIVE PROVISIONS OF THE ACT

Turning from Section 1 of the Act to its administrative provisions, it becomes more evident that the Congress did not intend nor have in mind proscribed liquors in drafting the Act.

This Court in the *Ziffrin Case* (308 U. S. 140) said:

"Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband."

Let us turn for a moment to the Emergency Price Control Act and examine just a few of its provisions.

REGULATIONS

Under Section 2 (d) it is provided that when the Administrator deems it necessary, he may "regulate" or prohibit speculative or manipulative practices (including practices relating to changes in form, or quality,) or boarding in connection with any commodity, etc.

There could be no clearer pronouncement that those commodities covered by the Act were subject to regulation and control by the Administrator and prescribes appropriate penalties for hoarding and the power to prescribe change in form or quality of the commodity.

ADMINISTRATOR CAN BUY OR SELL COMMODITIES

Again under Section 2 (e) it is provided, among other things, that the Administrator "may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers (only "moonshiners" are producers in Mississippi) of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to

obtain the maximum necessary production thereof."

Taking this provision in connection with the laws of any state where liquor is contraband and where the manufacture, possession, or sale of liquor is a violation of the laws of the state, is it to be conceived that the Congress intended that the Administrator should have the power to buy or sell at public or private sale, or store or use contraband liquor in such quantities as he deems necessary to obtain the maximum necessary production, or to supply the demand therefor, and make such subsidy payments to domestic producers (moonshiners) in such amounts and in such manner and upon such terms necessary to obtain the maximum necessary production, when to do any of these things would subject the Administrator to the penal provisions of the statutes of all states where liquor is contraband?

MAY ISSUE LICENSE

Under Section 205 (f) the Administrator may, if he deems it necessary and proper, issue a license as a condition of selling any commodity with respect to which to any regulation, order, or price schedule is applicable. If the contention of the learned Counsel for the Administrator be correct, and that the Administrator has the right in Mississippi to fix a maximum price on intoxicating liquors sold within this state, then, notwithstanding the laws of this state and in defiance thereof, he may license such dealers to sell liquors and control the sale thereof. Is it not inconceivable that the Congress would intentionally undertake to authorize any agency of the Government to license liquor dealers to sell contraband liquors, as pointed out by Chief Judge Maris in his dissent.

Throughout the entire Emergency Price Control Act there is not only no mention of intoxicating liquors, but every provision thereof carries on its face the intention of the Congress to safeguard the people of the Nation against exorbitant prices for life's necessities and not to make those things that are noxious more readily available in the market place.

MAXIMUM LAWFUL PRICE

Under the heading of definitions under Section 302 (i) the term "maximum price" is defined as meaning the "maximum lawful price for such commodities".

We can add nothing here to what Chief Judge Maris demonstrated in his dissent, except that there are legal commodities, as we have seen, and noxious commodities, and the Act was dealing with legal commodities only. It is but an addendum to that definition and a part of it.

In answer to Chief Judge Maris, the majority opinion assumes, as a major premise, that the Congress intended to authorize price fixing for contraband;

The Court said:

"Were such a construction to be followed, it would result that noncompliance with the state statutes or ordinances regulating the sales of commodities—such as sales on Sunday, sales without the required licenses, sales of certain drugs without a doctor's prescription, and the like—would confer immunity from price control upon persons making sales in violation of the provisions of the Emergency Price Control Act."

There is no regulation of the sale of whiskies in Mississippi or any other prohibition state, for sale is prohibited.

And the failure of the Court to differentiate between noxious and innoxious commodities, between regulation and total prohibition, is apparent from an examination of the case of

Jatros v. Bowles 143 Fed. (2d) (C.C.A. 6) 453,

upon which the opinion is largely based.

This case involved the sale of whiskey by the glass, above ceiling price. Subject to State regulation, the sale of liquor in Michigan was lawful, and was not being used or sold contrary to the laws of the State. The importation was lawful and the Twenty-first Amendment and the liquor Enforcement Act did not apply. If State controls were obeyed the sale was as lawful as if it had been bread instead of booze. Being a lawful commodity, the ceiling price was a lawful maximum price. Since the Twenty-first Amendment did not apply, the State not having acted, the other provisions of the Constitution applied and the whiskey was a part of the legitimate commerce of the Nation and subject to the Commerce Clause, in so far as State regulations did not limit it.

U. S. v. Frankfort Distilleries U. S., 89, *Adv. Op., L. Ed.*

Head note 5, page 652.

As to sales on Sunday, we submit that if it be a lawful sale on Monday the Administrator's Regulations are valid. Sunday is a day of rest and worship. The character of the

commodity has no part in Sunday violations. No one is prosecuted on account of what they sold on Sunday but for selling anything prohibited by the law. Every day is Sunday in the prohibition states.

As for sales without the required license, we might be content to answer: Then let the Administrator issue the license as the Act empowers him to do. However, no law, is cited whereby any commodity is contraband because sold by an unlicensed vendor. It would be, indeed, strange if a suit of clothes purchased from a merchant whose license had expired lost its property rights and could be seized and forfeited, because a merchant had violated a *revenue* statute.

As to sales of certain drugs without a doctor's prescription conferring immunity from price control, it should be sufficient to say that we are not concerned here with either the Food and Drug Acts of the National Government or those of the States, nor are we advised as to whether the Administrator has undertaken to fix a maximum price on any drugs or dope. We are concerned here with the Twenty-first Amendment and the Statutes of Mississippi as touching whiskey, for which Petitioners were indicted for selling the above the ceiling price prescribed by Regulation 445.

No one knew better than the Congress of the legion of regulations and laws of the forty-eight states on intoxicating liquors, and the ever changing laws; that States wet today may be dry tomorrow as the local necessities may demand. The great cities are always wet for they have police protection, and the lack of such protection impels the sparsely settled communities to be dry. They prefer to get their liquor from the police protected cities. All these

things may be reasons why the Congress did not even discuss intoxicating liquors.

The Congress had obeyed the mandate of the American people by enacting the Liquor Enforcement Act and must have determined that it had expressed its will as to the prohibition states and that it could not empower the Administrator to license bootleggers or do the other things within these States to effectively enforce the Act under the administrative provisions thereof, and that it could not consistently seize and forfeit liquors entering these States and then give tacit permission to sell those liquors that got by through fixing a price for such sales.

NO BASIS UPON WHICH TO FIX MAXIMUM PRICE

Section 2(a) provides:

"So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the *nearest two-week period* in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order."

The "nearest two-week period" clearly means either the two weeks before October 1, or after October 15, as the

Congress was dealing with two-week periods. If not, then "between October 1 and October 15", 1941, is meaningless and the Administrator could fix any date he chose.

We have seen that there was not on those dates nor any other date in 1941 or since, any open market in Mississippi, and the Section quoted, on its face, demonstrates that the Congress had in mind legitimate commerce, and prices to be found in the open day.

How would he ascertain such "prevailing prices" of contraband liquor in Mississippi between any two dates? Did the Congress intend that he should send his "boys" down into the dens of vice, into "speak-easies", "honkey-tonks", back alleys and the subteranian world and interview and question the fleeting shadows who own or haunt these "joints"?

If so, what information would they get as to the "prevailing price" on the long past date named in the Act?

Does not all this smack too much of the "stool pigeons" who haunt the underworld to entrap criminals, and not to gather trustworthy information, to be part of a high and worthy policy of government to learn values and prices in the open market place?

One "speakeasy" would have "Old Taylor", another "Rocking Chair", another maybe "I. W. Harper", and so through all named in the indictment, and the lower dives "moonshine". Upon these shifting quicksands the Administrator must, as best he can, build a foundation for prevailing prices. Any price fixed would be arbitrary, both in amount and as to time. The Congress has, through the

spirit permeating the entire Act, negatived any such purpose or any such intention.

In Regulation 445, involved here, there is listed seventeen states, called "Monopoly States," requiring a different formula not applicable to the other thirty-one states. We can find nothing in the Act that covers this situation, except by implication, as to basic requirements as to freight rates, expenses, taxes, etc. The point we make is that intoxicating liquors is not a National problem, nor part of the National commerce, except by sufferance of the States. If, without express authority from the Congress, the Administrator felt compelled to deal separately with respect to the "Monopoly States", then why should he not feel impelled to deal separately with "Prohibition States" shielded by express Constitutional mandate?

His jurisdiction over necessities is National, but not over liquors. There are no "Monopoly States" or "Prohibition States" for "bread, beds and bungalows."

The Court below in answering this contention, after citing *Lincoln Savings Bank v. Brown* 137 Fed. (2d) (E.C.A.) 228, a case involving the rental prices for lock boxes, (just as legitimate as the rent of a horse or house) said:

"Since the Administrator is to ascertain and give due consideration to prevailing prices, only so far as practicable, (emphasis supplied by the Court) inability to ascertain prevailing prices in the State of Mississippi for illegal sales would not thereby have rendered the Price Regulation invalid."

Which means that, if, in the ever recurring experi-

ments by the States, a majority of the States shall at some future day "dry up" again, some future Administrator could fix prices for half the Nation at what he deems reasonable and equitable on the basis of what a few wet states did.

In the *Yakus Case* 321 U. S. 414, 427, the Court said:

"The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purpose of the Act, and that in promulgating them consideration shall be given to prices *prevailing in a stated base period*, confer no greater reach for administrative determination than the power to fix just and reasonable rates."

What "base period" could the Administrator have chosen, how could he have discovered the prevailing prices?

The Act requires that he shall "so far as practicable, advise and consult with representative members of the industry (only bootleggers and "moonshiners" in Mississippi) which will be affected by such Regulation, and shall give consideration to their recommendations."

This breathes the very air of legitimate industries. Is it sufficient to consult with producers in Kentucky and fix prices in dry Kansas, or go to Ohio to find prices for dry Oklahoma, or Michigan and find prices for dry Mississippi? Is it conceivable that Congress had the prohibition states in mind when it wrote these provisions into the Act?

Here is one agency of the Government giving tacit permission to sell that which another agency is obligated to seize and forfeit.

Where is there in all the Codes of Christendom another paradox so grotesque?

PRICE REGULATION INCONSISTENT WITH STATE LAW

Since the Congress did not intend to deal with price fixing of whiskey in prohibition states, it is immaterial whether the Regulation is consistent or inconsistent with State law. The prevailing opinion limited its inquiry as to sales under the Regulation, and ignored the administrative provisions of the Act and held there was no conflict.

The Emergency Price Control Act confers, as a necessary measure of effective control, the power to license sales of contraband liquors, to buy, sell, store, aid in manufacture, encourage production, enter into voluntary agreements with producers, manufacturers, retailers, wholesalers; purchase commodities to obtain evidence of violations, and the like, every one of which would be in defiance of the laws of prohibition states and of Mississippi in particular. The conflict is obvious.

But, the Court said, the Regulation is valid on its face. We might answer that that depends from what capitol of which state you look upon it, whether from a wet or dry state. If the Regulation wore on its face the powers we have just noticed, we would not be admonished by the *Yakus* Case, that the Emergency Court of Appeals was the only Court where we could challenge the validity of the Regulation, because we would not then have to go behind the Regulation to discover its invalidity. It is because it is valid on its face that we went into that Court and why we seek admission here. The Twenty-first Amendment, the Stat-

utes of Mississippi, the Liquor Enforcement Act, the long legislative and judicial history are not reflected in the Regulation, but all lie behind it.

Every provision of the Act is consistent with the purpose of regulating the legitimate commodities of the Nation and wholly inconsistent with an intention to regulate those commodities that are inherently vicious, leaving those who deal in them to answer to the Criminal Codes, State and National.

The Federal Government cannot impose penalties even in aid of a State's prohibition laws.

U. S. v. Constantine 296 U. S. 287.

The Congress has not proclaimed that the National Emergency demands that the Twenty-first Amendment and the Statutes of the prohibition states shall be ignored in the interest of the war effort; it has not proclaimed that cheap liquors, in order to create a wider effective demand by workers, soldiers, students and the public, is necessary for the efficient prosecution of the war as was National prohibition in former wars. Only by such declaration can the need be known. The Congress being silent, there is no other agency of the Government that can so determine.

This is the first instance in the history of the Nation when any agency of the Government ever undertook, by law or regulation, in war or peace, to guarantee cheap liquor to the people of the Nation.

There is a current wise crack in Mississippi that "fifteen dollar a quart liquor has cured more booze heads than

all the Keely Institutions in the world".

The statement in the opinion that price controls were "necessary to remove the incentive to divert supplies to an area where uncontrolled prices would otherwise be obtained, with subsequent pressure upon price control in neighboring States", might be plausible if the neighboring States were impotent to stop exportation and the Federal Government was not under *duty* to stop importation. In short, the logical conclusion is: The neighboring States do not choose to stop exportation, the Federal Government does not choose to stop importation, therefore, the liquor being in Mississippi, this conferred power to the Administrator to regulate. Power is not conferred upon an agency of the Federal Government by inaction, it must be conferred by express Constitutional grant. There is no interstate commerce here that creates implied power because of effects on that commerce, for these liquors are excluded from its protection. The problem calls for a policeman, not an Administrator.

The Court said: "Complainants have failed to establish that the Regulation in question is inconsistent with the laws of Mississippi, with the purposes of the Emergency Price Control Act, or invalid in any other particulars."

We have no witness except the Constitution, the Statutes of the State, the decisions of this Court, the provisions of the Act itself and the history lying behind them all. We respectfully submit they are credible witnesses.

The Government can tax but it cannot regulate contraband liquors.

We, therefore, submit that the Act should be held inapplicable to contraband liquors in Mississippi. Section 303 of Act.

SECOND:

....Did the Congress have Constitutional power to regulate or delegate authority to regulate intoxicating liquors in States where such liquors are without property rights and contraband?

We limit the question solely to that. We do not question the power of regulation in states where liquor is a lawful commodity. We have no such issue in this case.

Section 303 of the Act is as follows:

"Sec. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby."

We have undertaken to take the Act by its four corners and demonstrate that contraband liquors were not intended to be regulated under it. Of course, if no such purpose is disclosed by the Act, whether he had power or not is immaterial.

We have shown that no such power is to be implied, but must clearly appear. We have seen that such liquors are not named in the Act, and that under the Constitution they are divorced from all other commodities and com-

merce and placed in a separate category.

We have further seen that the only power Congress has over such liquors, in states where there are no property rights in them, is to prohibit and prevent importation or transportation into such states.

That Congress has the power to tax, we do not question. It can tax what it prohibits itself or what the state prohibits.

But it cannot regulate, control or penalize that which the States have prohibited. The government can enter the state to collect its revenue, but it cannot in anywise intervene in the states' enforcement of its penal laws or create a property right in contraband. To do so would be to invade and usurp the police powers of the States.

This, we submit is so clear that any analysis of cases would be to demonstrate the common-place.

U. S. v. Constantine 296 U. S. 287.

Linder v. U. S. 268 U. S. 5, 18.

Does the war power of the Congress give such authority?

We do not question the broad powers of the Congress as to the "urgent business" of war.

The first prerequisite is to declare its purpose that it may be measured by the fundamental law.

As we have shown now and repeat, intoxicating liquors that enter States contrary to its laws, do so in violation of the Constitution. Can the Congress, as a war measure, regulate and penalize within such states?

No Congress has ever yet declared that a wider distribution of liquors was necessary to the prosecution of war.

Unless the pronouncements of science and the unanimous judgments of this Court are to be pronounced false, then absolute prohibition of the sale or disposition of intoxicating liquors is in aid of the war effort, and it is beyond the power of the Congress to invade or delegate the authority to invade the States and regulate the liquor traffic conducted there contrary to their laws, and do the things we have seen that the Administrator has power to do under the Emergency Price Control Act.

James Clark Distilling Co. v. Western Ind. R. R. Co.
242 U. S. 311, 332.

This case drew in question the Constitutional validity of the Webb-Kenyon Act and the West Va. Act prohibiting the importation of liquors for personal use. The Webb-Kenyon Act prohibited the importation, if in violation of State law.

The Court sustained both Acts, and in responding to the argument that the power of such regulation would destroy the Commerce Clause of the Constitution, the Court said: (p. 332)

"The fact that regulations of liquor have been upheld in numberless instances which would have been

repugnant to the great guaranties of the Constitution but for the enlarged right possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the Constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be Constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

That intoxicating liquors have been left to the exclusive jurisdiction of the States, if the States so choose, is no longer a debatable question. Their police power is supreme. It is unnecessary to invoke the Tenth Amendment to demonstrate that. This Court has too often decided that issue. But the exclusive control by the State is guaranteed both by the Tenth and the Twenty-first Amendments. To enter the States and by regulation of intoxicating liquors contrary to the criminal laws of the State violates both Amendments, and is an invasion of the police powers of the State.

This Court has held that this cannot be done, either in war or peace.

In *Hamilton v. Kentucky Distilleries* 251 U. S. 156, this Court said:

"The war power of the United States, like its other powers and like the police power of the states, is sub-

ject to applicable constitutional limitations (*Ex parte Milligan*, 4 Wall. 2, 121-127; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336; *United States v. Joint Traffic Asso.* 171 U. S. 505, 571; *McCray v. United States v. Joint Traffic Asso.* 171 U. S. 505, 571; *McCray v. United States*, 185, U. S. 27, 61; *United States v. Cress*, 243 U. S. 316, 326.)

In *Ex Parte Milligan*, just cited, it was said page 125:

"No doctrine, involving more pernicious consequences, was ever invented by the wit of men than that any of its (the Constitution) provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to Anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the its existence"

The necessity of creating Quasi property rights in that in which the State has destroyed all property rights, by price fixing and regulations cannot be found in the history of intoxicants by legislative enactments or decisions of Courts. The duty of the government to seize and forfeit is a negation of any right or power to price and sell.

After the adoption of the Twenty-first Amendment the American people viewed with satisfaction the folding of the tents of the "fanatical drys" and the "whiskey rings", and the gathering up of their choice adverbs and adjectives and statistics and their departure to their state Capitols there to wage ceaseless war for ages to come as they have for generations past, with alternate triumphs and defeats. But whatever laws emerge they shall be respected by the

National government, whether they be wise or foolish in other men's judgment. The wisdom of this Court has been justified: The States only are competent to cope with the problem.

The Government can avoid the charge of being *in pari delicto* with those who run the state's red stop lights, by using its great powers in aiding the state in handling a most difficult problem, and not hampering by displaying its own green lights to proceed as long as they do not exceed the price limits prescribed by Regulation.

We earnestly submit that the Writ of Certiorari should be granted and the judgment dismissing the complaint should be reversed.

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.....
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I hereby certify that copies of the foregoing Petition for Writ of Certiorari and Supporting Brief and Record have been served upon the Solicitor General of the United States and Respondent.

This, the day of September, 1945.

.....
ATTORNEY

INDEX

| | Page |
|--|------|
| Opinion below----- | 1 |
| Jurisdiction----- | 1 |
| Questions presented----- | 2 |
| Statutes and regulations involved----- | 2 |
| Statement----- | 2 |
| Argument----- | 4 |
| Conclusion----- | 11 |
| Appendix----- | 12 |

CITATIONS

Cases:

| | |
|--|----|
| <i>Jameson and Company v. Morgenthau</i> , 307 U. S. 171----- | 10 |
| <i>License Tax Cases</i> , 5 Wall. 462----- | 10 |
| <i>Lincoln Savings Bank of Brooklyn v. Brown</i> , 137 F. (2d) 228----- | 4 |
| <i>Philadelphia Coke Co. v. Bowles</i> , 139 F. (2d) 349----- | 7 |
| <i>Taub v. Bowles</i> , 149 F. (2d) 817, certiorari denied, October 8, 1945, No. 195, this Term----- | 7 |
| <i>United States v. Frankfort Distilleries</i> , 324 U. S. 293----- | 10 |
| <i>United States v. One Ford Coupe Automobile</i> , 272 U. S. 321----- | 10 |
| <i>United States v. Sullivan</i> , 274 U. S. 259----- | 10 |
| <i>Wainer v. United States</i> , 299 U. S. 92----- | 10 |
| <i>Washington Brewers Institute v. United States</i> , 137 F. (2d) 964, certiorari denied, 320 U. S. 776----- | 9 |

Constitution, Statute and Regulation:

| | |
|--|----------------|
| Constitution, Twenty-first Amendment----- | 10 |
| Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess. and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess: | |
| Section 1 (a)----- | 7, 12 |
| Section 2 (a)----- | 4, 5, 8, 9, 13 |
| Section 2 (d)----- | 14 |
| Section 2 (e)----- | 14 |
| Section 204 (c)----- | 15 |
| Section 204 (d)----- | 16 |
| Section 204 (e)----- | 3, 17 |
| Section 205 (f)----- | 6, 19 |
| Section 302 (b)----- | 20 |
| Section 302 (c)----- | 4, 20 |
| Section 302 (i)----- | 3, 5, 6, 21 |
| Maximum Price Regulation No. 445, 8 F. R. 11161----- | 2 |

Miscellaneous:

| | |
|--|---|
| Rule 18 (a), Emergency Court of Appeals----- | 3 |
|--|---|

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 451

J. W. BARNETT, SR., MRS. J. W. BARNETT, SR.,
AND J. W. BARNETT, JR.

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES EMERGENCY COURT OF APPEALS*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 61-68) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on August 29, 1945 (R. 69). The petition for a writ of certiorari was filed on September 24, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. Supp. IV, sec. 901, as

amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess. (herein sometimes termed "the Act"), making applicable Section 204 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether regulations establishing maximum prices for alcoholic beverages may under the provisions of the Emergency Price Control Act be validly applied to sales made in contravention of state prohibitory legislation.
2. Whether the Twenty-first Amendment to the United States Constitution precludes the establishment under the Emergency Price Control Act of maximum prices for sales of alcoholic beverages in states where such sales are prohibited.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act appear in the Appendix, *infra*, pp. 12-21. The maximum price regulation involved in this proceeding is printed in the Federal Register (8 F. R. 11161).

STATEMENT

Petitioners were indicted in the United States District Court for the Southern District of Mississippi for making sales of alcoholic beverages in the State of Mississippi at prices in excess of the maximum prices established by Maximum

Price Regulation No. 445 (R. 20-21). Pursuant to leave granted by the district court under Section 204 (e) of the Emergency Price Control Act, petitioners filed a complaint with the United States Emergency Court of Appeals asserting that the regulation, as applied to sales made in violation of the state prohibition legislation, was invalid under the Act and the Twenty-first Amendment to the United States Constitution (R. 1-5).

Petitioners having elected not to present evidence, respondent moved to dismiss the complaint on the ground that petitioners had failed to establish a right to relief (R. 48).¹ The court below dismissed the complaint, holding that petitioners had failed to establish that the regulatory provisions were in conflict either with the Emergency Price Control Act or the Twenty-first Amendment (R. 61-66). One judge dissented on the ground that the definition of "maximum price" set forth in Section 302 (i) of the Act precluded the application of price control to commodities

¹ Rule 18 (a) of the Emergency Court of Appeals establishes procedures for the presentation of evidence in support of allegations of fact presented in the pleadings filed with the Court. Petitioners failed to apply for leave to introduce evidence in support of their complaint, and indicated that there was no evidence which they wished to submit (R. 57). On application by respondent for leave to present evidence relevant to issues of fact presented by the complaint and answer, petitioners replied that they relied solely upon the issues of law presented by their complaint (R. 57-60).

which may not legally be sold under state law (R. 66-68).

ARGUMENT

(1) Petitioners' principal contention is that sales of intoxicating liquors made in violation of state prohibitory legislation are outside the scope of the Emergency Price Control Act. In support of this contention, petitioners urge that such intoxicating liquors, at least while in the confines of a prohibition state, are not "commodities" as that term is employed in the Act.

The provisions of the Emergency Price Control Act leave no room for this contention. Section 2 (a) of the Act delegates to the Administrator the authority to establish maximum prices for "commodities." In Section 302 (c) the term "commodity" is broadly defined to include "commodities, articles, products, and materials," subject to exceptions for specified commodities and transactions which are exempt from price control. In *The Lincoln Savings Bank of Brooklyn v. Brown*, 137 F. (2d) 228, 230 (E. C. A.), the Emergency Court of Appeals pointed out with respect to the provisions of Section 302 (c) that "This is an extremely broad definition encompassing, we believe, all things possessing the attribute of tangible existence, * * *." Intoxicating liquor, wherever sold, clearly falls within this definition. Moreover, as the opinion of the court below pointed out, since the Act defines the commodities and transactions which are outside the

scope of the Act, it would be plainly improper to add by implication to the list of exemptions specified by Congress (R. 65).

Likewise improper is the attempt to imply an exception for the transactions in question on the basis of the statutory definition of the term "maximum price." In Section 2 (a) the Administrator is granted the authority to "establish * * * maximum prices." Section 302 (i) provides: "The term 'maximum price,' as applied to prices of commodities means the maximum lawful price for such commodities * * *."

We submit that the plain and natural meaning of Section 302 (i) is to complete the thought implied, but not fully expressed, in the grant of authority to "establish * * * maximum prices." In an accurate use of language, the Price Administrator could not be said to have the power to "establish" a "price" or to "establish" a "maximum price," since actual prices and price levels can be established only by buyers and sellers. The only authority which Congress conferred upon the Administrator was the power to prescribe prices which buyers and sellers may not exceed without incurring the penalties prescribed for such unlawful conduct.

Petitioners contend that Congress, by referring to a "maximum lawful price" intended to preclude the application of a maximum price regulation to transactions made unlawful under state law. This construction violates the natural mean-

ing of the words used in the Act, by reading Section 302 (i) as referring not to a "lawful price," but to a lawful *transaction*, and by importing into the definition of "maximum prices" to be established by the Administrator a reference to legality under state law, a thought wholly alien to the basic purport of the statutory provisions establishing a national program of price control.

Moreover, in the absence of compulsion from the terms of the statute, there is no occasion to adopt a construction which, in the words of the majority opinion, "would subject all prices established by the Administrator to a criterion so extreme and incongruous" (R. 64). Thus, if petitioners' construction were adopted, there seems no escape from the consequence that price control could be defeated by making transactions in violation of any of a multitude of state police restrictions. As was pointed out in the opinion below, such an intent may not be imputed to Congress, particularly in view of the absence of any suggestion in the legislative history that such a result was contemplated by the definition set forth in Section 302 (i) of the Act (R. 64).

Petitioners point to provision in the Emergency Price Control Act for certain special types of regulatory action, such as licensing,² which could not

² It may be observed that issuance of a license to sell a commodity under Section 205 (f) of the Act merely confers authority to sell insofar as the Emergency Price Control Act is concerned, and in no wise purports to authorize sales in contravention of the restrictions and prohibitions imposed by local law.

appropriately be applied to liquor in prohibition states. This argument, however, does not lead to the conclusion that regulations establishing maximum prices may not be applicable to such sales. Congress conferred on the Price Administrator a broad array of ancillary powers of limited applicability. It would be plainly erroneous to conclude that the scope of the basic authority to establish maximum prices must be limited to those situations in which all of the ancillary powers could appropriately be exercised.

Petitioners' contention, unsupported by any evidence, that establishment of maximum prices for sales of intoxicating liquor in Mississippi does not effectuate the purposes of the Emergency Price Control Act is without substance. Certainly this proposition may not be deduced, as a matter of law, from the face of the regulation and statute. On the contrary, it is apparent that, as the court below pointed out, the regulation falls squarely within the objective "to stabilize prices" listed at the outset of Section 1 (a), which sets forth the purposes of the Act. The Emergency Court of Appeals has repeatedly sustained the reasonableness of the Price Administrator's determination that inflation in the price of any one commodity threatens the stability of prices for other commodities. *Philadelphia Coke Co. v. Bowles*, 139 F. (2d) 349 (E. C. A.); *Taub v. Bowles*, 149 F. (2d) 817 (E. C. A.), certiorari denied October 8,

1945, No. 195, present Term. Moreover, it is apparent that price control for liquors in Mississippi also serves the purposes of the Act in counteracting the inevitable tendency to market scarce commodities in an area of uncontrolled prices, which would divert liquor supplies from surrounding states and thereby increase the pressure on prices in those states (R. 65). Furthermore, the price controls in question would be appropriate even if the control of prices of intoxicating liquors as such were not within the purposes of the Act, since as the court forcefully pointed out, "Without such price control scarce raw materials and productive effort needed to produce necessities for the armed forces and the public would likely be diverted into the manufacture and production of goods, unnecessary, or not so necessary, to the nation during the period of national emergency" (R. 66).

Section 2 (a) of the Emergency Price Control Act directs the Price Administrator "so far as practicable" to "give due consideration to the prices prevailing between October 1 and October 15, 1941 * * *." Petitioners have contended that this requirement prevents the Price Administrator from establishing maximum prices for sales of intoxicating liquors in Mississippi on the ground that there was no legal market price to which he could refer. But no evidence was offered to show that there was no prevailing price for intoxicating liquors in Mississippi during

this period. In any event, as the opinion below pointed out, the duty imposed on the Price Administrator by Section 2 (a) is merely to ascertain prevailing prices "so far as practicable"; inability to ascertain prevailing prices in only one state plainly would not invalidate a regulation.

(2) Petitioners urge that application of the maximum price regulation to sales in Mississippi, even if authorized by the Act, is barred by the Twenty-first Amendment to the Constitution. As the court below pointed out, this contention is advanced in the absence of any showing of conflict between the regulation and the state prohibitory legislation (R. 63). Thus, the establishment by the Price Administrator of price ceilings in no wise implies authorization to make sales contrary to state police regulations. Nor did petitioners offer any evidence that application of the nationwide regulation to sales in the State of Mississippi has in any manner interfered with the state prohibition program.³ Indeed, as the court found, the price regulation inevitably tends to operate in aid of the state and federal laws which prohibit importation and sale of liquor in this state, by minimizing the inevitable tendency

³ No suggestion has been made that the authorities charged with enforcing the state prohibition legislation consider the enforcement of the maximum price regulation inconsistent with local law or policy. Cf. *Washington Brewers Institute v. United States*, 137 F. (2d) 964 (C. C. A. 9), certiorari denied, 320 U. S. 776.

of sellers to market a scarce commodity in an area of uncontrolled prices (R. 65).

In the absence of a showing of conflict between the national and state regulations, the only alternative argument open to petitioners is that the Twenty-first Amendment has wholly withdrawn from the federal government authority to regulate intoxicating liquors, a contention which has been decisively rejected by this Court. *United States v. Frankfort Distilleries*, 324 U. S. 293; *Jameson & Company v. Morgenthau*, 307 U. S. 171. Likewise, this Court has had occasion repeatedly to reject the suggestion that the illegality of an act under state law confers an immunity from federal legislation. *License Tax Cases*, 5 Wall 462; *Wainer v. United States*, 299 U. S. 92; *United States v. Sullivan*, 274 U. S. 259; *United States v. One Ford Coupe Automobile*, 272 U. S. 321. Fully applicable to the contention which petitioners now urge is the statement in the *License Tax Cases, supra*, as follows:

It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union (5 Wall at 473).

We submit that there is no substance to the suggestion that the maximum price regulation under attack in any way conflicts with the provisions of the Twenty-first Amendment.

CONCLUSION

The case was rightly decided and does not warrant review, particularly in view of the lack of any evidence in the record in support of petitioners' contentions as to the relationship of the state and national regulatory programs. The petition should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

RICHARD H. FIELD,
*General Counsel, Office of Price
Administration.*

OCTOBER 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., are as follows:

SECTION 1 (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary coop-

eration between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are

generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. * * *

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and con-

ditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof. * * *

SECTION 204. (c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which

The it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation issued under section 2, of any order or schedule effective in accordance with price provisions of section 206, and of any provision of any such regulation, or any price schedule. Except as provided in this section, no court, Federal, State, or in territorial, shall have jurisdiction or power to consider the validity of any such regulation, or order, or price schedule, or to stay, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance

ance of such regulations or orders or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with sub-

section (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this

paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

Section 205. (f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such

price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. * * *

SEC. 302. As used in this Act—

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(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other the-

ater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

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(i) The term "maximum price," as applied to prices of commodities means the maximum lawful price for such commodities, * * * .